In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1726

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN ALFRED HAMILTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

Respondent contends that this case is moot.[1] We submit that this contention is frivolous.

As noted in our petition, the opinion of the court of appeals reversing respondent's conviction was published on January 2, 1974, and the government's petition for rehearing was subsequently denied on March 18, 1974. On April 10, 1974, on motion of the Solicitor General, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to May 17, 1974. However, no stay of the mandate of the court of appeals was sought or ob-

[1]The Memorandum in Opposition also advances other arguments against certiorari. Since we believe these arguments require no further answer beyond what has already been said in our petition, this memorandum is confined to respondent's claim of mootness.

tained.[2] The mandate accordingly routinely issued on April 15, 1974. On April 22, 1974, the case was routinely placed on the calendar of the district court by the clerk and was dismissed without objection from the United States Attorney, who was unaware of the extension of time to petition which Mr. Justice Douglas had granted. On learning of the Solicitor General's intention to petition for a writ of certiorari, however, the United States Attorney successfully moved in the district court on May 17, 1974, to withdraw the earlier order dismissing the indictment.

1. Issuance of mandate by the court of appeals is immaterial, since the spreading of the mandate does not defeat the jurisdiction of this Court. See *Aetna Casualty Co.* v. *Flowers*, 330 U.S. 464, 467; *Carr* v. *Zaja*, 283 U.S. 52, 53; *The Conqueror*, 166 U.S. 110, 113; *Louisville & Nashville R. Co.* v. *Behlmer*, 169 U.S. 644, 648.

2. Nor does the initial dismissal of the indictment by the district court render this case moot, for the district court later granted the government's motion to withdraw the original order of dismissal and reinstate the indictment. This action was taken 25 days after the order dismissing the indictment. Since this was within the time for appeal, respondent can make no contention that the order was final so as to preclude corrective action by the

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[2]When a court of appeals has simply reversed a conviction without ordering any specific affirmative action to be undertaken thereafter, the government customarily does not seek a stay of mandate simply because it is considering seeking or has sought Supreme Court review, since we are of the view that no stay is necessary to protect our statutorily provided rights of review in this Court. Because the decision whether or not to seek certiorari normally cannot be made by the Solicitor General prior to issuance of the court of appeals' mandate, requirement that a stay be obtained to preserve the government's right of review by this Court would precipitate a flood of such applications for protective purposes.

district court. With the indictment against petitioner thus reinstated, a case and controversy exists; the decision by this Court, if favorable to the government, will finally determine the validity of respondent's conviction. Therefore, the case is not moot and consideration by this Court is appropriate.

3. Finally, respondent's reliance on Rule 48(a) of the Federal Rules of Criminal Procedure is misplaced. Contrary to his assertion, the dismissal of an indictment on the government's motion pursuant to Rule 48(a) is generally perceived as being without prejudice. See *United States* v. *Chase*, 372 F. 2d 453 (C.A. 4); *United States* v. *Arradondo*, 483 F. 2d 980, 983 (C.A. 8); *United States* v. *Davis*, 487 F. 2d 112, 118 (C.A. 5); *DeMarrias* v. *United States*, 487 F. 2d 19, 21 (C.A. 8).[3]

For the reasons stated in our petition and this reply memorandum, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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[3] *Woodring* v. *United States*, 311 F. 2d 417 (C.A. 8), cited by petitioner for the proposition that a Rule 48(a) dismissal is with prejudice, involved dismissal occurring after the government had presented its case to the jury, thus invoking jeopardy. In *White* v. *United States*, 377 F. 2d 948 (C.A.D.C.), the court of appeals determined from the record that the trial court had specifically intended its dismissal to be with prejudice.

In the instant case, respondent having been convicted in his original trial and the court of appeals having ruled in petitioner's favor on an evidentiary matter, there is no argument that the Double Jeopardy Clause would bar further prosecution, regardless of the finality of the district court's initial action dismissing the indictment. Respondent could thus be reindicted and retried, and the issue of the admissibility of the evidence would be critical to the second trial. Thus, even on the palpably erroneous assumption that the dismissal was somehow not correctable, this case is not moot.